No. 75-235

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G. M. LEASING CORP., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In this federal income tax case, petitioners contend that they met their burden of proving that the Internal Revenue Service's assessment was erroneous, that a levy on their property violated their Fourth Amendment rights, and that their corporation was entitled to recognition as a separate taxable entity.

The pertinent facts are as follows: An Internal Revenue Service audit of George I. Norman, Jr., revealed that he failed to file tax returns for the years 1970 and 1971. Norman was a fugitive from justice so that during the course of the audit the agent had to rely on third-party records. The agent's examination

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demonstrated that Normal owed taxes for 1970 and 1971 (Pet. App. A–2).

On March 19, 1973, jeopardy assessments in the amount of approximately $1.1 million were entered against Norman and his wife (Pet. 6; Pet. App. A–2). The following day, Internal Revenue Service agents went to Norman's residence, where they requested payment from his wife. However, she refused to pay the jeopardy assessments (Pet. App. A–2).

A further investigation by the revenue agents revealed that petitioner G. M. Leasing Corp. was the alter ego of Norman (Pet. App. A–2). Accordingly, on March 21, 1973, the agents went to an office, which had been listed in G. M. Leasing Corp's name, and which formerly had been occupied by Norman. The premises were owned by one of Norman's son, petitioner George I. Norman, III. The agents attempted to levy on the property in that office to satisfy Norman's tax liability (Pet. App. A–3; I–R, 14, 132–133).[1] With the aid of locksmiths, they opened the doors of the building and garage. Shortly thereafter, petitioner George I. Norman, III, arrived and claimed that the automobile in the garage belonged to him. The agents then decided to leave the premises without seizing anything because they were uncertain as to the ownership of the property located in the buildings (Pet. App. A–3).

After consulting with their superiors, the agents returned to the premises on March 23, 1973 (Pet. App.

[1] "I–R," and "II–R." refer to the two-volume record appendix filed in the court of appeals.

A–3; I–R. 31–32). They again used locksmiths to gain entry, and, upon the advice of Internal Revenue Service attorneys, seized the books and records they found and placed them in boxes without inspecting them. The documents were later photocopied and returned to G. M. Leasing Corp. (I–R, 33–34). In addition, the agents seized automobiles and a bank account listed in the name of G. M. Leasing Corp. (Pet. App. A–3).

Petitioners brought this action in the United States District Court for the District of Utah requesting, *inter alia,* the return or destruction of the photocopies of the documents seized, suppression of evidence obtained from the seized documents, and release of all levies (Pet. App. A–3 to A–4). The government counterclaimed for foreclosure of its tax levies on the ground that G. M. Leasing Corp. was the alter ego of George I. Norman, Jr. (Pet. 6; II–R, 71–72). The district court held that the tax assessment was erroneous, that the Service's levies upon the property and documents had been executed improperly, and that G. M. Leasing Corp. was not the alter ego of Norman (Pet. App. A–14 to A–21). Accordingly, the court entered judgment for petitioners and dismissed the government's counterclaim (Pet. App. A–22 to A–24). The court of appeals reversed, holding that at the time of the seizure, the government had a valid existing lien upon all the property involved (Pet. App. A–1 to A–14).

1. The court of appeals correctly held that the tax assessment against Norman was presumptively cor-

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rect. Thus, petitioner G. M. Leasing Corp., whose property was seized in satisfaction of Norman's tax liability on the ground it was the alter ego of Norman, had the burden of proving that the tax assessment against Norman was erroneous (Pet. App. A–11). See, *e.g., United States* v. *Rexach,* 482 F.2d 10 (C.A. 1), certiorari denied, 414 U.S. 1039; *Bar L Ranch, Inc.* v. *Phinney,* 426 F.2d 995 (C.A. 5); United *States* v. *Lease,* 346 F.2d 696 (C.A. 2).[2]

Petitioners do not dispute these general principles here, but contend (Pet. 10–13) that the court of appeals erred in not holding the entire $1.1 million assessment arbitrary and erroneous on the basis of the government's concession that one $115,000 item in the assessment was erroneous. The settled rule, however, is to the contrary. A taxpayer's demonstration that one item in an assessment is erroneous satisfies his burden only as to that item; the assessment as to each of the additional items must be sustained until each is shown to be erroneous. *Foster* v. *Commissioner,* 391 F.2d 727, 735 (C.A. 4); *Anderson* v. *Commissioner,* 250 F.2d 242, 246 (C.A. 5); *Hoffman* v. *Commissioner,* 298 F.2d 784, 788 (C.A. 3); *Clark* v. *Commissioner,* 266 F.2d 698 (C.A. 9). Although petitioners assert (Pet. 11–12) that those cases involved "separable items," the assessment here was similarly comprised of separate items, such as omissions of income from

[2] *United States* v. *Rindskopf,* 105 U.S. 418, cited by petitioner (Pet 11), is not to the contrary. There, the Court held that a tax assessment was *prima facie* proof of liability but that the taxpayer could contest any material fact upon which it was based.

various stock sales, and numerous unsubstantiated business deductions Pet. App. A–11 to A–12).

Contrary to petitioners' argument (Pet. 12–13), nothing in *Bar L Ranch, Inc.* v. *Phinney, supra,* or *United States* v. *Lease, supra,* conflicts with this item-by-item approach to the burden of proof allocation. *Bar L Ranch* involved only one item—a sale of land in exchange for a promissory note—and therefore cannot be deemed to speak to an assessment involving multiple items. Similarly, *Lease* held that proof of error as to one item satisfies the taxpayer's burden only as to that one item.[3]

2. The court of appeals also correctly held that the Internal Revenue Service agents conducted a valid levy under 26 U.S.C. 6331 and not an illegal search and seizure (Pet. App. A–9 to A–10). The record shows that a jeopardy assessment was entered, that demand for payment was made and that there was a refusal to pay (Pet. App. A–2). Under Section 6331 (b), the taxpayer's refusal to pay allows the United States to collect the tax by levy, which includes the power of "seizure by any means." Thus, the agents were acting pursuant to applicable federal revenue

[3] In *Lease*, the Second Circuit approved a jury charge which stated that if a taxpayer shows that there is an "error with respect to a particular item the presumption of correctness of the computation by the Commissioner and assessment with respect to that item disappears and then the burden shifts to the government to prove whether any deficiency exists and if so in what amount" (346 F.2d at 701). Thus, if a taxpayer shows that a separate item is incorrect, then the Commissioner must introduce rebuttal evidence if he is to avoid judgment for the taxpayer as to that item.

provisions in seizing the taxpayer's property.[4] Moreover, the record clearly demonstrates that the levy was upon the advice of counsel and was executed with great caution and deference to petitioners' rights (I–R, 14, 21–23, 33).

There is no basis for petitioners' contention (Pet. 14–17) that the seizure violated their Fourth Amendment rights. This Court rejected an identical argument more than a century ago in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 17 How. 272, 285–286. See also *Phillips* v. *Commissioner*, 283 U.S. 589, 596; *Fuentes* v. *Shevin*, 407 U.S. 67, 97–92 and n. 24, affirming on this issue *Fuentes* v. *Faircloth*, 317 F. Supp. 954, 958 (S.D. Fla.).

3. Finally, the court of appeals correctly concluded that the evidence overwhelmingly showed that G. M. Leasing Corp. was Norman's alter ego. Contrary to petitioners' argument (Pet. 17–18) that the court of appeals incorrectly assumed that they had the burden of proving non-alter ego status, the government stipulated in the district court that it had the burden of proving that G. M. Leasing Corp. was the alter ego of Norman. Thus, the court of appeals fully recognized that the burden of proof was on the government with respect to this issue. However, its conclusion that G. M. Leasing Corp. was the alter ego of Norman

[4] The court of appeals observed that the property seized included books and records only because "[i]t was thought that the documents might be, or could indicate the location of, money and stock certificates" (Pet. App. A–3).

was based on the overwhelming evidence which demonstrated that Norman exerted substantial, if not exclusive, control over the corporation; that Norman dealt with the corporations' assets as if they were his own property; that the directors were mere figureheads; and that, as stated in the testimony of an incorporator-director, the corporation was merely a shell of Norman and had no assets or property of its own (Pet. App. A–6). Moreover, while the corporation was nominally in the automobile leasing business, it never leased any automobiles, had no employees, paid no wages, held no directors' or stockholders' meetings, issued no stock, and paid no sales[5] or use tax (Pet. App. A–7 to A–8; I–R, 71–73, 80–81, 98–100).[6]

[5] On the corporation's sales tax status report filed with the State of Utah two months before the levy, it reported that the business was "inactive to present" (Ex. D–2).

[6] Petitioners also contend (Pet. 18) that since their motion for a directed verdict at the close of the government's case was granted, the court of appeals should not have reversed, but rather should have remanded the case to permit them to offer further evidence. However, the record shows that the district court did not grant petitioners' motion for a directed verdict. Instead, it heard oral argument from each side (I–R, 155–170), asked for legal memoranda (I–R, 168–169), and stated that "in the state of this record this afternoon * * * I am in no position to decide this today" (I–R, 169–170). If petitioners had any additional evidence to offer, they should have sought to do so at that time, since the district court had not granted the motion and indicated that it was going to decide the case on its merits (I–R, 140, 166, 169–170). Moreover, the judgment does not refer to a directed verdict but states that it was based on the evidence presented and the previously made findings of facts and conclusions of law (II–R, 90).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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